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Supreme Court of the United States

OCTOBER TERM, 1947

No. 812

MRS. LIBBYLEI GRAVES McKEWEN,

Appellant,

versus

MRS. MARJORIE L. McKEWEN and UNITED STATES OF AMERICA,

Appellees.

RESPONSE TO MOTION TO DISPENSE WITH CERTAIN DESIGNATED ITEMS OF PROOF IN THE PRINTED RECORD, ANSWER OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND REPLY BRIEF IN SUPPORT THEREOF.

S. M. GRAHAM,
Attorney for Mrs. Marjorie L. McKewen, Appellee.

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IN THE
SUPREME COURT OF THE UNITED STATES

No.

MRS. LIBBYLEI GRAVES McKEWEN,
Appellant,

versus

MRS. MARJORIE L. McKEWEN and UNITED STATES OF AMERICA,
Appellees.

RESPONSE TO MOTION TO DISPENSE WITH CERTAIN DESIGNATED ITEMS OF PROOF IN THE PRINTED RECORD.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

On the hearing in the District Court, there were 87 documents taken from the Veterans' Administration record and stipulated by written agreement of counsel as constituting the facts on which the cause was submitted to the District Court. On appeal to the Circuit Court of the Fifth Circuit, the stipulation agreement by counsel in writing reduced the number of such documents from 87 to 34 to be included in the record to the Circuit Court of Appeals, all of which occupy only 46 short pages in the printed record to the Circuit Court of Appeals, 10 copies of which are now on file in this court.

We see no undue burden in printing this short record, especially, when to do so, would deprive this Court and the respondent of much vital and material evidence.

Item 29, page 64, is the marriage license of the respondent to the deceased insured, to eliminate which, would disqualify the respondent as a member of a class eligible as beneficiaries of National Service Life Insurance.

Item 26, page 50, and Item 27, page 53, are two letters from the United States Justice Department to the United States District Attorney handling the litigation in which the applicable regulations and laws are set forth and construed as well as the contentions of appellant.

Item 22, page 40, contains all the evidence of oral expressions of intention and desire by the deceased insured with reference to the beneficiary of his insurance.

Item 20, page 39, is an admission that the signature of the deceased insured on the documents changing his beneficiary was compared by the Veterans' Administration with the original signature on the application for the insurance, and that the signature was genuine. Verification of the signature being made necessary by the appellant denying the signature of the deceased insured to the documents changing his insurance beneficiary.

Item 15, page 35, is letter from Veterans' Administration to the Adjutant General of the War Department, advising receipt of certified copies of the Government Insurance Report form and Officer's Data Sheet, from Kearney, Neb., which the Veterans' Bureau proposed to accept but that the mother, appellant, had questioned the signatures of said documents and asked the War Department to forward the application for insurance for the purpose of comparing signature of deceased insured on the Government Insurance Report Form and Officer's

Data Sheet with that on the original application for the insurance.

We think that this attitude of the appellant, mother, is very material because if she had not considered these documents as sufficient to change the beneficiary of the insurance in question, she would have had no purpose in denying the signature thereon.

Item 30, page 66, is letter from the Veterans' Administration to the appellant mother, which in our opinion is most vital and material, because, it admits the right of deceased insured to change his beneficiary of his insurance at any time without the knowledge or consent of the original beneficiary, and admits possession of documents over the signature of deceased insured in which his expressed wishes were set forth and which must be accepted as binding upon the Veterans' Administration, giving the mother the privilege of furnishing any information in her possession dated subsequent to October 20, 1943 (date on which said documents were executed) over the signature of the deceased insured, in which he had expressed an intention contrary to that as outlined above.

Item 31, page 67, is letter from Veterans' Administration admitting that the beneficiary of the policy in suit had been changed from the mother, appellant, to the respondent.

Item 32, page 68, is letter from the mother appellant to the Director of Insurance of the Veterans' Administration protesting its act of accepting the change of beneficiaries, which protest now seems to be without merit, yet, according to the opinion of the Circuit Court of Appeals, (R-83), 165 F. 2nd 761, it caused the suspen-

sion of further payments to the widow and respondent under the award made to her, and so, has become a part of this case and should not be eliminated.

Item 33, page 69, is letter of disagreement, without which the Court is without jurisdiction.

Item 34, page 70, is letter from the Veterans' Administration to opposing counsel after this suit was filed, in which it is admitted that the change of beneficiary by the deceased insured from his mother to his wife, widow and respondent, was normal and logical.

So that this record having been considered by the District Court and Circuit Court of Appeals has become so scrambled as to be impractical to attempt at this late date to unscramble.

We humbly submit that the record as agreed upon twice by counsel should not at this later date be mutilated.

S. M. GRAHAM,
Attorney for the Respondent.

I, S. M. Graham, counsel for respondent, Mrs. Marjorie L. McKewen, certify that a true copy of the foregoing reply to appellant's motion has been mailed to Barnett, Barnett & Jones and Garner W. Green, attorneys for movant, to their usual place of abode and address, with sufficient postage attached thereto, properly addressed and delivered to the United States mail on this the .... day of ....., 1948.

S. M. GRAHAM,
Attorney for the Respondent.

IN THE
SUPREME COURT OF THE UNITED STATES

No.

MRS. LIBBYLEI GRAVES McKEWEN,
Appellant,

versus

MRS. MARJORIE L. McKEWEN and UNITED STATES OF AMERICA,
Appellees.

ANSWER OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND REPLY BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Since the statement of the proceedings as to the parties, their relation, and the action of the courts, and the issue involved are sufficient for the purpose of considering this petition, and for the sake of brevity, we will avoid further statement.

Rule 38, paragraph 5, provides that a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. We earnestly urge that there are no special or important reasons for allowing the writ in the case at bar.

1. Petitioners have limited their right and reason for the writ to that set out in the first sentence of Rule 38, par. 5b "where the Circuit Court of Appeals has ren-

dered a decision in conflict with the decision of another circuit court of appeals on the same matter". Counsel contends that the decision of the Fifth Circuit, here asked to be reviewed, conflicts with the decision of the Tenth Circuit, in *Bradley vs. United States*, 143 F. 2nd 573 (cert. den. 65s, C. T. 429, 323 U. S. 793, 89 L. Ed. 632) and allege that this conflict in views of these two circuits should be clarified for the future guidance of the courts and of the Veterans' Administration.

1. We positively deny that there is a conflict in these two decisions or that the courts or the Veterans' Administration have been, or are likely to be mislead or confused by this alleged conflict.

2. We deny that this court can declare in the case at bar what the judicial recognition courts should give an administrative finding of the Veterans' Administration.

3. We deny that there is any lack of uniformity in the decisions relating to the facts under the National Service Life Insurance Act, or the facts in the case at bar.

S. M. GRAHAM,
Attorney for Respondent.

I, S. M. Graham, counsel for respondent, Mrs. Marjorie L. McKewen, certify that a true copy of the foregoing answer of respondent to petition for writ has been mailed to Barnett, Barnett & Jones and Garner W. Green, attorneys for movant, to their usual place of abode and address, with sufficient postage attached thereto, properly addressed and delivered to the United States mail on this the .... day of ....., 1948.

S. M. GRAHAM,
Attorney for Respondent.

IN THE
SUPREME COURT OF THE UNITED STATES

No.

MRS. LIBBYLEI GRAVES McKEWEN,
Petitioner,

versus

MRS. MARJORIE L. McKEWEN and UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINIONS DELIVERED.

In addition to the opinions listed in counsel's brief, we add the decision of the Veterans' Administration making award to the respondent and appellee as appears from Item 16, (R-37), Item 25, (R-50), opinion of the Circuit Court of Appeals in the case at bar, (R-83), 165 F. 2nd 761.

STATEMENT AS TO JURISDICTION OF THE CIRCUIT COURT OF APPEALS.

The manadate from the Circuit Court of Appeals dated March 24, 1948, was filed by the Clerk of the District Court, where the case at bar was tried, March 25, 1948, and the mandate has never been recalled by the Circuit Court of Appeals issuing the mandate, and no order for a stay or a recall of the mandate has been requested by opposing counsel at the time they petitioned this court for the issuance of a writ to the Circuit Court of Appeals.

REPLY BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI.

The *Bradley* case, *supra,* decided by the Tenth Circuit Court of Appeals on May 30, 1944, decided that the mere intention of an insured to change his beneficiary in a National Service Life Insurance contract was insufficient to effect such change, and that a confidential record required of a soldier by the War Department, which was not intended for the Veterans' Administration and to which the Veterans' Administration was a stranger, but intended only for the War Department, and not having any reference to the change of beneficiary in any insurance, did not constitute an overt act by the insured to change his insurance beneficiary. It holds that all formalities and technicalities should be brushed aside by the courts in an effort to carry out the wishes of the soldier, where the soldier intended to change his beneficiary and made an overt effort to change it, leaving

only ministerial acts to be performed by the insurer. This holding, as I understand the law, is in harmony with the universal holdings of the District Courts and Circuit Courts of Appeal.

The trouble with counsel's reasoning is that he attempts to place a document executed by the insured dealing solely with matters of insurance in the same category with a confidential document executed for other purposes.

As evidence that there is no conflict between the Fifth and Tenth Circuits is the fact that the Tenth Circuit came along over three years later and on June 23, 1947, decided the case of *Collins vs. United States, et al.*, 161 F. 2nd 64, cert. den. 67 S. Ct. 1756, 331 U. S. 859, 91 L. Ed. 1866, in which the opinion rendered therein by the Tenth Circuit was not only in perfect accord with the cases of *Mitchell vs. United States, et al.*, 165 F. 2nd 758, and the case at bar in 165 F. 2nd 761 by the Fifth Circuit Court of Appeals, but the Tenth Circuit *actually reversed the District Court for following the Bradley case, supra,* and held as a matter of law that because the facts in the two cases were different, *that there was no conflict between the Bradley and Collins cases, supra,* and consequently, between the *Bradley* and *McKewen* cases *supra,* and since the Tenth Circuit Court of Appeals, by its own adjudication, has held that there is no conflict in its holdings, it is tantamount to holding that there is no conflict between the law as announced by the Tenth Circuit Court of Appeals, and that announced by the Fifth Circuit Court of Appeals, and so,

it follows, that there is no reason for the issuance of any writ of certiorari by this court to clarify an alleged conflict when none exists.

As for the importance of this court declaring the judicial recognition courts should give an administrative finding of the Veterans' Administration, we submit that this court would have to deny the writ, or if allowed, to affirm the case, because of the fact, that, in the case at bar, the Veterans' Administration awarded this insurance to the widow and respondent herein, and actually paid her under that award the sum of $935.60, Item 16, (R-37), and Item 21 (R-40).

In response to counsel's contention that an award was made to the original beneficiary and appellant, and that same should be final and binding on this court, we wish to call the court's attention to paragraph 6 of the Answer of the United States filed August 21, 1946, in the District Court at Meridian, Mississippi (R-10), which says:

> "Defendant admits the allegations of paragraph 8 of plaintiff's complaint, except to deny that the benefits of the deceased veteran's $10,000 National Service Life Insurance policy have been awarded or paid thus far to the insured's mother, Mrs. Libbylei Graves McKewen, and answering further defendant alleges no further payments of insurance benefits will be awarded or paid on the policy in suit pending final disposition of this action."

If an award had been made to the appellant mother, it was also awarded to the widow and respondent, so that the court in this case, could not hold that either award was final.

We submit that there is uniformity in the decisions relating to the facts under the National Service Life Insurance Act, and as evidence of that fact the case of *Claffy vs. Forbes,* 280 F. 233, from the District Court of the Western Division of Washington, decided way back in April, 1922, has been quoted at great length and cited with approval by the majority of the Circuit Courts of Appeal, as well as by any number of District Courts ever since that opinion was rendered right down to the present day, as we find in the opinion in the case at bar on (Record 83).

It is interesting to note a listing of cases in counsel's brief in which the facts supporting a change of beneficiary in the National Service Life Insurance policy were insufficient to effect a change, and a listing of cases in which the facts were held to be sufficient to show a change of beneficiary, which we adopt as representing the overwhelming weight of authority.

In the cases where the proof was insufficient to effect a change of beneficiary, they cite the case of *Bradley, supra,* decided by a divided court with a strong dissenting opinion, with which we have already dealt, and the only other case cited is the case of *Ramsey vs. United States,* 72 F. Sup. 613, from the District Court of the Southern District of Florida, the Jacksonville Division, July 31, 1947, within the Fifth Circuit. We assume that, if it were not for the fact that in the *Ramsey* case, *supra,* there was no evidence whatever of any overt act on the part of the insured soldier to change his beneficiary, no documents of any kind ever executed dealing with a

change of beneficiary, this court would not be impressed with the decision in the *Ramsey* case, *supra,* in the face of the two decisions by the Fifth Circuit Court, of which Florida is a part, in the *Mitchell* case, *supra,* and its opinion in the case at bar.

The District Court decided that the facts in the case at bar are controlled by the case of *Roberts v. United States, et al.,* 4th Circuit, 157 F. 2nd 906, cert. den. 67 S. Ct. 870, 330 U. S. 829, 91 L. Ed. 1278. (R-58.) The Circuit Court of Appeals in its opinion (R-83) as reported in 165 F. 2nd 761 thinks that the facts in the case at bar were controlled by the case of *Mitchell vs. United States,* 72 F. Supp. 352; 165 F. 2nd 758. For other cases where the holding is in line with the almost universal holding where certiorari has been denied by this court, we cite the case of *Collins vs. United States, et al.,* 10 Cir., 161 F. 2nd 64, cert. den. 67 S. Ct. 1756, 331 U. S. 859, 91 L. Ed. 1866.

As the case of *Claffy v. Forbes,* 280 Fed. 233, is a leading case on the questions of fact herein involved and has met with the widest possible approval by the Federal District and Circuit Courts throughout the United States, we quote from this case at length:

> "The insured may change the beneficiary in writing, signed by the insured, and witnessed by one person (Regulation 14, dated March 20, 1918). By amendment of this regulation dated February 24, 1919, the change may be made by notice in writing to the Bureau of War Risk Insurance, signed by the insured, or by his duly authorized agent, the change

to be effective when received and recorded in the War Risk Insurance Bureau. Under the regulations of February 24, 1919, if the insured had written to the bureau, supra, that upon the death of his mother, the beneficiary, to pay the unpaid installments to the niece, such designation would undoubtedly have been sufficient and if the mother during her lifetime had notified the bureau, supra, in writing, pursuant to the provisions of the letter, that upon her death the unpaid installments should be paid to the niece, the designation would have sufficed. The intent to designate the niece as residuary beneficiary is explicitly established. Does the fact that the designation was by misapprehension of the laws sent to the mother, instead of the bureau, defeat the soldier's intent and right granted him under the insurance contract and law?

"This inquiry must be answered in the negative. Is the designation made in harmony with the regulations at the time it was received by the bureau sufficient? Yes. The only purpose of the regulations, having relation to change of beneficiary, is to enlarge the right of the insured, and to protect the insurer. To hold the designation in the letter sufficient does not change the liability of the insurer, and is within the privilege granted the insured. The brothers and sisters of the deceased soldier have no right, except that of blood relationship, and all right is determined against them by the expressed designation by the deceased in harmony with the regulations at the time it was presented. The execution and receipt of designation must be taken together. It takes both to conclude the issue, and form, formality, and legal technicality must give way to common sense and remedial justice, when all doubt is removed as to the intent of the deceased soldier; and

when the purpose of the law has been complied with, there should be no hesitancy in carrying out the express wish of such deceased. The letter is a designation signed by the insured and the fact that it was sent to the mother to make the final designation, in the event of her death, instead of being sent to the bureau for record, should not defeat it.

"All that is necessary is that the real wish and purpose of the soldier, who exposed his life in the army for the safety of the government, should sufficiently appear (notes, Cooper's Justinian, p. 496, R. E.; Gifts Inter Vivos, Jaen-Marie Ricard, printed in Paris in 1754, p. 332.); nor is it vital that notice of designation should be received by the bureau prior to the death of the insured. The regulations of February 24, 1919 (paragraph 3), provide for such a contingency:

> " 'Before notice of such designation has been received and recorded by the bureau, payment shall be made to those entitled according to the laws of intestacy, as provided in section 402 of the War Risk Insurance Act.'

"Throughout the history of the civilized world, since the decrees of Julius Caesar, the intention and wish of the soldier, with relation to designation of beneficiary or disposition of property, killed in the line of duty, has been carried out when ascertained, whether it was scrawled in the sand with the point of his sword, or written on the scabbard of his sword or his shield (The Customs of Duchy of Burgundy, printed at Dijon, 1694, p. 410; Coutumes de Paris, column 51, Paris, 1714); and remedial justice requires, under the facts in this case, that the designation of the niece in the letter to the mother be established from the date of presentation to and record thereof by the Bureau of War Risk Insurance."

This is still the law according to the case of *Van Doren versus United States, et al.*, 68 Fed. Sup. 222, where it is held that the regulations for the change of beneficiary in National Service Life Insurance is identical in War Risk cases with those under National Service Life Insurance, and cites both provisions for comparison and also holds that the Government Insurance Report Form and Officer's Data Sheet need no explanation as they speak for themselves, and cites the cases of *Johnson v. White*, 8 Cir., 39 Fed. (2d) 793; *Claffy v. Forbes, supra; Steele v. Suwalski*, 7 Cir., 75 F. (2d) 885; *Farley v. United States*, 291 F. 238, in support thereof.

We cite the following cases to show that there is no lack of unanimity in the holding of the courts with the holding of the Fifth Circuit Court of Appeals in the case at bar:

Ambrose v. United States, 15 F. (2d) 52;
United States v. Sterling, 2 Cir., 12 F. (2d) 921;
Peart v. Chaze, (D. C.) 13 F. (2d) 908;
Margaret Elizabeth Roberts, Appellant, v. U. S. and Joe Johnson Roberts, Appellee, 157 F. (2d) 906;
Citron v. United States and Adelaide Rosenschien, 69 F. Sup. 830;
Woods v. United States, et al., 69 Fed. Sup. 760;
Walker v. United States, et al., 70 Fed. Sup. 422;
Collins v. United States, 161 F. (2d) 64 cert. den. 67 Sup. Court 1756;
Eggleston v. United States, et al., 71 Fed. Sup. 114;
Van Doren v. United States, et al., 68 Fed. Sup. 222;
Mitchell v. United States, et al., 165 F. (2d) 758, 5 Cir.;

White v. United States, 270 U. S. 175, 46 S. Ct. 274, 70 L. Ed. 530;
Gregg v. United States, 15 F. (2d) 8;
Kaschefsky v. Kaschefsky, et al., 110 F. (2d) 836;
Shroeder v. United States, 24 F. (2d) 420;
Shepherdson v. United States, 271 F. 330;
Chinchiarelli v. United States, 26 Fed. (2d) 484.

The insured soldier does not have to ask anybody to change his beneficiary for him because he has no access to nor control over the records on which the change is to be made. He only has to express his intention by designating in writing the one he prefers as beneficiary and sign the designation, identifying the insurance and the insured, and the rest is ministerial. When a soldier makes a designation in writing, which identifies his insurance and the insured, and signs same, it is binding on the Government when it reaches the Veterans' Administration, regardless of how it reaches the Veterans' Administration, whether it reaches the Veterans' Administration before or after the death of the insured, or whether the designation is made upon any particular form, Items 26 and 27 (R-50 to 54). It does not make any difference whether the designation, when so made by the insured soldier, is in the files of the War Department, or the files of the Veterans' Administration at the time of the death of the soldier, it takes effect from receipt by the Veterans' Administration and relates back to the date of its execution subject to previous payments made by the insurer.

The appellant bottomed her claim on the failure of the Veterans' Administration to require use of Form 336 by the insured in designating his change of beneficiary

from appellant to appellee, when according to Items 26 and 27 (R-50 to 54), Form 336 was not even available for change of beneficiary during the period of service by the insured in the case at bar. All acts and intentions of an unmarried insured soldier loses force and effect when he thereafter marries and assumes new and different obligations. *McKewen vs. McKewen, et al.*, 165 Fed. (2d) 761.

The Government Insurance Report Form and Officers' Data Sheet executed by the insured soldier in the case at bar on October 20, 1943, at Kearney, Nebraska, in which he designated a new beneficiary of his insurance evidently satisfied the soldier, the Veterans' Administration, until the mother so bitterly protested, the United States District Court, who tried the issue as to whether the said documents were sufficient to cause a change of beneficiary, the Circuit Court of Appeals in affirming the action of the District Court, the United States, as it did not appeal from the decree in the District Court; and evidently satisfied the appellant as being sufficient as a designation, because of her denial of the signature of her son on said documents.

Appellee feels that she has been unduly delayed by this continued litigation in the enjoyment of her rights as beneficiary of the insurance in the case at bar, and that she is entitled to some redress in the way of damages if the Court thinks proper to allow any.

The appellee humbly urges the Court to deny the Writ of Certiorari prayed for herein, for which she will ever pray.

S. M. GRAHAM,
Attorney for Mrs. Marjorie L. McKewen, Appellee.

I, S. M. Graham, attorney for appellee, hereby certify that I have mailed a true copy of the foregoing brief to Barnett, Barnett and Jones, and Garner W. Green, attorneys for appellant, at their usual place of residence, properly addressed with sufficient postage attached thereto, and deposited with the United States mail on this the .... day of ....., 1948.

S. M. GRAHAM,
Attorney for the Appellee.